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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ET AL.,
Petitioners,

vs.

JOSEPH W. EVANS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONERS OSCAR MAYER & CO., ROBERT M. BOLZ, N. D. OTTENS, DONALD L. PAUL, PAUL F. GOULD.

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OPINIONS BELOW.

The Opinion of the District Court for the Southern District of Iowa of July 8, 1977, denying petitioners' Motion to Dismiss is reported unofficially at 17 FEP Cases 218 and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert. Pet. App. A1-A7). The Opinion of the Eighth Circuit Court of Appeals of April 5, 1978, reversing the trial court, is reported unofficially at 17 FEP Cases 221 and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert. Pet. App. A8-A14). The Eighth Circuit Court of Appeals' Opinion on Rehearing issued on July 6, 1978, withdrawing its Opinion

of April 5, 1978, and affirming the trial court, is reported at 580 F. 2d 1298 and is reproduced in the Appendix to the Petition for Certiorari (Cert. Pet. App. A15-A21).

JURISDICTION.

The opinion by a divided panel of the Court of Appeals was entered on July 6, 1978 (Cert. Pet. App. A15-A21). Petition for rehearing en banc was denied on July 7, 1978 (Cert. Pet. App. A22). The Court granted the writ of certiorari on October 30, 1978. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

This case involves the interpretation and application of Section 14(b) of the Age Discrimination in Employment Act, 29 U. S. C. § 633(b) (hereinafter referred to as the "ADEA") and Section 706(c) of Title VII of the Civil Rights Act of 1964 as amended, 42 U. S. C. § 2000e-5(c). The relevant portion of Section 14(b) reads as follows:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . . .

The relevant portion of Section 706(c) reads as follows:

> In the case of an alleged unlawful employment practice occurring in a State, . . . which has a . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . ., no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law unless such proceedings have been earlier terminated . . . .

Also relevant are section 7(d) of the ADEA, 29 U. S. C. § 626(d) and sections 601A5, 6, and 14 of the Code of Iowa. All of these statutory provisions are set forth in full in the Appendix (App. 8).*

QUESTION PRESENTED.

In states having laws prohibiting age discrimination in employment and establishing agencies to grant or seek relief from such discriminatory practices, is the filing of a charge of age discrimination with such a state agency a mandatory prerequisite to filing a civil suit in federal district court raising such claims under the ADEA?

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* Since the initiation of this lawsuit, section 7(d) has been amended by the 1978 Amendments to the Age Discrimination in Employment Act, Pub. L. 95-256, 92 Stat. 189. The Amendments are not relevant to the questions raised in this case.

STATEMENT OF THE CASE.

Petitioner Oscar Mayer & Co. ("Oscar Mayer"), a corporation incorporated under the laws of the state of Delaware and licensed to do business in Iowa, owns and operates a meat processing plant in Davenport, Iowa. Petitioners Robert M. Bolz, N. D. Ottens, Donald L. Paul, and Paul F. Gould are employed by Oscar Mayer in executive and administrative capacities. Respondent has alleged that these individuals are responsible for making personnel decisions affecting employees at the Davenport plant. (App. 3-4.)

Respondent was employed by Oscar Mayer as a hog buyer for 23 years until his retirement on January 31, 1976. He reported to the Davenport plant, and operated out of and resided in Williamsburg, Iowa. (App. 4.)

On March 10, 1976, respondent filed with the United States Department of Labor a notice of intent to sue under the ADEA, claiming that he was "forced" to retire and that his termination was in violation of the ADEA (App. 4).

The Iowa Civil Rights Act of 1965, as last amended in 1977, provides that it is unlawful for any employer "to refuse to hire, . . . to discharge any employee, or to otherwise discriminate in employment . . . against any employee because of the age . . . of such . . . employee." Section 601 A.6, Code of Iowa. Further, the Act establishes the Iowa State Civil Rights Commission "to receive, investigate and pass upon complaints alleging unfair or discriminatory practices." Section 601 A.5(2), Code of Iowa. Any person claiming to have been discriminated against is to file a complaint with the Commission within 120 days of the alleged discriminatory practice. Section 601 A.14(1), (15), Code of Iowa. If the Commission is unable to settle the complaint, it may hold an evidentiary hearing and, if it finds a violation of the Iowa Act, issue a cease and desist order and direct the employer to take affirmative action including reinstatement of the complaining employee with back pay. Section 601 A.14(6), (12), Code of Iowa.

Despite these statutory provisions, respondent never filed a complaint with the Iowa State Civil Rights Commission. Instead, on March 7, 1977, one year after filing his notice of intent to sue with the United States Department of Labor, he filed a complaint in the United States District Court for the Southern District of Iowa, Davenport Division, alleging that the termination of his employment at Oscar Mayer on January 31, 1976 constituted age discrimination prohibited by the ADEA.

Petitioners moved the district court to dismiss the complaint for lack of jurisdiction over the subject matter due to respondent's failure to file a timely complaint of age discrimination with the Iowa State Civil Rights Commission as required by Section 14(b) of the ADEA, 29 U. S. C. § 633(b). On August 8, 1977, this motion was denied by the trial judge who held that the filing of an age discrimination claim with a state agency was not a prerequisite to the institution of a civil suit under the ADEA (Cert. Pet. App. A1-A7).

On appeal, the Court of Appeals for the Eighth Circuit, on April 5, 1978, initially reversed the decision of the district court and held that resort to the state agency was required under the ADEA. Judge Bright, writing for the majority stated (Cert. Pet. App. 11):*

> We conclude that, in a state having laws that prohibit age discrimination and having an agency with authority to seek relief from such practices, filing a charge with the state agency is mandatory under the ADEA and is a prerequisite to the filing of an action in federal court.

Respondent filed a petition for rehearing and suggestion for rehearing en banc. Respondent's petition was supported by the Secretary of Labor, who, on April 26, 1978, was permitted to file an amicus curiae brief. On July 6, 1978, a divided panel of the Court of Appeals withdrew its opinion of April 5, 1978 and affirmed the district court's order. Judge Henley, who

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* Judge Bright was joined in his opinion by Judge Talbot Smith, United States Senior District Judge, Eastern District of Michigan, sitting by designation. Judge Henley dissented.

originally dissented, wrote the majority Opinion on Rehearing, noting that "the authorities are in conflict, and the question is not free from doubt". He went on to hold, however, that the "preferable view" was that an individual was not required to file a complaint with a state agency before instituting a civil suit in federal court. (Cert. Pet. App. A18-A19.)*

SUMMARY OF ARGUMENT.

The plain language of Section 14(b) sets forth a mandatory prerequisite to the filing of a civil suit in federal court alleging claims of age discrimination. This interpretation is supported by the identity of language between Section 14(b) and the state deferral provisions of Title VII of the Civil Rights Act of 1964, § 706(c), 42 U. S. C. § 2000e-5(c), which has consistently been interpreted to require claimants to file charges of discrimination with state authorities before proceeding on the federal level. Further, Section 14(b) is phrased similarly to Section 7(d) of the ADEA which sets forth other procedural requirements uniformly interpreted as jurisdictional prerequisites to the filing of a federal lawsuit.

The legislative history of the ADEA indicates that Congress desired to structure the Act in a manner that would encourage the settlement of age discrimination claims in the most expeditious fashion possible with formal proceedings being utilized only as a last resort. This purpose is frustrated by the decision of the court below, which held that filing with state authorities is not mandatory and thus increases the likelihood of individual claims of age discrimination ripening into litigation.

During the Congressional hearings on the ADEA, testimony was offered suggesting that the Act have state deferral provisions modelled after Title VII. This testimony was never

* Judge Henley was joined by Judge Smith who had concurred in the court's original opinion that an individual was required to file a timely complaint with a state agency before instituting suit under the ADEA. Judge Bright, consistent with his opinion of April 5, 1978, dissented to the court's opinion of July 6, 1978.

disputed or debated but, as noted above, Section 14(b), as it was subsequently enacted, is phrased identically to Section 706(c) of Title VII. This demonstrates that Section 14(b) was modelled after Section 706(c) and should be interpreted accordingly.

ARGUMENT.

I. Introduction

The sole issue before the Court is the interpretation and application of Section 14(b) of the ADEA. Petitioners contend that in states having laws prohibiting age discrimination in employment and establishing authorities to enforce these laws, Section 14(b) *requires* an aggrieved individual to file a timely charge of age discrimination with the state authority and to give that state authority at least sixty days to resolve the charge before instituting an action in federal court.

Despite the clear language of the statute, respondent interprets Section 14(b) as being optional in nature. He contends that Section 14(b) allows each individual who feels aggrieved to determine for himself whether he wishes to utilize available state remedies. But if he does file a timely charge of age discrimination with the state authority, even respondent concedes that he must then wait as least sixty days before instituting an action under the ADEA in federal court.

The implications of this question upon the well-expressed desires of both the federal and state governments to remove all vestiges of age discrimination from employment are profound. The only federal authority empowered to enforce laws against age discrimination is the Department of Labor. Its powers are limited to attempting to resolve claims of age discrimination by informal pursuasion and conciliation and, if it chooses to do so, as a last resort, by instituting suit. *See* 29 U. S. C. § 626(b).

Past experience has demonstrated that since the passage of the ADEA in 1967, the Department of Labor has been largely unequipped to deal to any significant degree with individual charges of age discrimination. As Senator Peter Domenici observed during Senate Hearings concerning the proposed legislation that became the 1978 Amendments to the ADEA:

> [W]hen the Age Discrimination in Employment Act of 1967 was originally enacted, Congress was acting out of the best of intentions. But it has been diffidently enforced by the Labor Department, resisted by both labor and management, and for many years supported in a rather lukewarm fashion by middle age and older workers.

Hearings Before the Subcommittee on Labor of Senate Committee on Human Resources on S. 1784, 95th Cong., 1st Sess. at 51 (1977).

During House hearings, Representative William Randall expressed similar sentiments:

> [I]n spite of their [the Department of Labor] hard work and dedication, and some increased funding for manpower, the backlog of ADEA cases grows year after year most damatically. ADEA is only one of 82 statutes for which compliance officers have responsibility.
>
> The Department of Labor has had unloaded on it 82 different enforcement jobs. We find that ADEA activities account for only about 5 percent of the Department of over 1,100, assigned full time to ADEA activities.
>
> In other words, not a one is devoting his full time to ADEA.

Hearings Before Subcommittee on Equal Opportunities of the House Committee on Education and Labor on H. R. 14879 and H. R. 15342, 94th Cong., 2d Sess. at 5 (1976).

It is thus clear that state authorities enforcing state laws against age discrimination are a necessary, effective, and viable mechanism by which laws against age discrimination in employment can be enforced short of individual lawsuits in federal court. To this end, thirty states, as well as the District of Columbia and Puerto Rico, have promulgated laws prohibiting age discrimination *and* have established authorities to enforce these laws.*

* An additional eight states have passed age discrimination laws, but have not established authorities to enforce these statutes.

Petitioners' interpretation of Section 14(b) requires aggrieved individuals to take advantage of these state authorities and thus maximizes the possibility of resolving claims of age discrimination before they reach the federal courts. Respondent's position that each aggrieved individual has the option of filing a charge with the state agency or, after notifying the Department of Labor, of proceeding directly in federal court, allows any person with an age discrimination complaint to completely ignore available administrative avenues of relief.

We submit that respondent's position leads to undue congestion of federal court calendars with age discrimination cases which may otherwise be resolved through the administrative processes. Such a result is not only undesirable but, as discussed below, is contrary to the clear language of the ADEA and the Congressional intent behind the statute.

II. The Plain Language of Section 14(b), Its Identity with Section 706(c) of Title VII, and Its Relationship to Section 7 of the ADEA Establishes That State Filing Is Mandatory Under the ADEA.

A. A Mandatory Prerequisite is Established by the Plain Language of Section 14(b).

Section 14(b) expressly provides that filing with a state agency is mandatory. It states:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.* . . . (Emphasis added.)

The State of Iowa has a law prohibiting age discrimination in employment and has established the Iowa State Civil Rights

Commission to grant or seek relief from such discriminatory practices. Section 601 A.5, 6, Code of Iowa. Respondent has never contested the fact that the Iowa Commission satisfies the requirements of Section 14(b). Further, respondent concedes that he never made any resort to the Iowa Commission for relief.

In its opinion on rehearing, the court below held that *"an individual has the option* of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency" (Emphasis added; Cert. Pet. App. A19). This is completely inconsistent with the plain language of section 14(b) which provides that *"no suit may be brought . . . before the expiration of sixty days after proceedings have been commenced under the State law"* (emphasis added).

This plain language led the Second Circuit Court of Appeals, in direct contrast to the court below, to conclude that Section 14(b) sets forth a mandatory prerequisite to a civil suit under the ADEA. In *Reich* v. *Dow Badische Co.*, 575 F. 2d 363, 370 (2d Cir. 1978), the Second Circuit held:

> Much of appellant's argument mistakenly proceeds on the tacit premise that resort to the state remedy is a technical step devoid of substantive content, and that, therefore, the slightest of showing will warrant setting the bar of Section 633(b) aside. That ignores the paramount circumstances, that the state remedy, or rather remedies, presented appellant with a full and adequate system of relief, that there was no reason for turning to the federal remedy that did not equally direct appellant to the state remedies, and that the scheme of the ADEA very explicitly requires that the grievant timely present his claim to the state authority before suing.

B. The Identical Wording of Section 14(b) of the ADEA and Section 706(c) of Title VII Establishes That They Should Be Interpreted in the Same Manner.

Section 14(b) is couched in language almost identical to that appearing in Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(c), which provides as follows:

> In the case of an alleged unlawful employment practice occurring in a State, . . . which has a . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . ., *no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law unless such proceedings have been earlier terminated.* . . . (Emphasis added.)

When enacting Title VII, Congress intended Section 706(c) to require prior resort to state agencies. This was made clear by the following remarks of Senator Humphrey concerning pending legislation that ultimately became the Civil Rights Act of 1964 (110 Cong. Rec. 12721 (1964)):

> If the practice complained of occurs in a State or locality which has a law prohibiting such practices and establishing an agency to deal with them . . . the individual complainant cannot file his charge with the Commission until the State or local agency has been given an opportunity to handle this problem under State or local law. However, after the agency has had 60 days to adjust the complaint or after it terminates proceedings on it, the complainant may go to the Federal Commission.

The federal courts have uniformly held that an individual must resort to appropriate state agencies before suit may be brought under Title VII. *Love* v. *Pullman Co.*, 404 U. S. 522 (1972); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (8th

Cir. 1975); *Local 5, Electrical Workers* v. *EEOC*, 398 F. 2d 248 (3d Cir.), *cert. denied* 393 U. S. 1021 (1968). The Tenth Circuit Court of Appeals explained the rationale behind these decisions in *Dubois* v. *Packard Bell Corp.*, 470 F. 2d 973, 975 (10th Cir. 1972):

> When . . . Title VII was being debated on the Senate floor there were strong objections to the manner in which its original provisions would have bypassed efforts at the state or local level to correct unfair employment practices. The final bill, accordingly, included the "Dirksen Amendment" as a compromise to expedite its passage. As Senator Humphrey explained, subsections 706(b) and (d) of the amended bill guarantee that the states . . . will be given every opportunity to employ their expertise and experience . . . before federal agencies are resorted to.

As noted above, Section 14(b) of the ADEA is phrased almost identically to Section 706(c) of Title VII. This identity of language, coupled with the legislative history and judicial interpretations of section 706(c), have led the overwhelming majority of federal courts interpreting Section 14(b) to conclude, contrary to the court below, that this provision sets forth a mandatory prerequisite to a civil suit under the ADEA. *See, e.g., Reich* v. *Dow Badische Co.*, 575 F. 2d 363 (2d Cir. 1978); *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975); *Enos* v. *Kaiser Industries Corp.*, 443 F. Supp. 798 (D. D. C. 1978); *Fitzgerald* v. *New England Telephone Co.*, 416 F. Supp. 617 (1976), *modified*, 437 F. Supp. 635 (D. Mass. 1977); *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E. D. Mich. 1976); *Berry* v. *Crocker Nat'l Bank*, 13 FEP Cases 673 (N. D. Cal. 1976); *Acford* v. *Exxon Corp.*, 12 FEP Cases 1500 (D. Conn. 1975); *Arnold* v. *Hawaiian Telephone Co.*, 12 FEP Cases 400 (D. Hawaii 1975); *McGinley* v. *Burroughs Corp.*, 407 F. Supp. 903 (E. D. Penn. 1975); *Smith* v. *Crest Communities Inc.*, 8 FEP Cases 1328 (W. D. Ky. 1974); *Forman* v. *Block Drug Co.*, 16 FEP Cases 414 (E. D. N. Y. 1977); *Prater* v. *Shell Oil Co.*, 15 FEP Cases 1114 (W. D. Ky. 1977).

Most recently, this principle was reaffirmed in *Hadfield* v. *Mitre Corp.*, Civil Action No. 74-2946-S, 47 U. S. L. W. 2338 (D. Mass. 1978), where the court adopted this line of authority establishing the mandatory nature of Section 14(b). As the Ninth Circuit Court of Appeals held in *Curry* (513 F. 2d at 693):

> [W]e concur in the reasoning of those courts that have held decisions interpreting 42 U.S.C. § 2000e-5(b) [as amended 42 U.S.C. § 2000e-5(c)] . . . to be generally applicable for purposes of interpreting § 633(b). . . . "The minor differences between § 633 and its counterpart under the 1964 Act are insignificant and provide no support for an interpretation of the former which is contrary to" interpretations of the latter. [Footnote and citations omitted.]

The majority opinion of the court below simply ignored the similarity between Section 706(c) and Section 14(d). Instead, the court rested its opinion on its belief that while "the authorities are in conflict and the question is not free from doubt", the "preferable view" was that an individual was not required to file a complaint with a state agency before instituting a civil suit (Cert. Pet. App. A18-A19).

Some precedent does exist, in addition to the opinion of the court below, in support of respondent's theory that Section 14(b) is not mandatory. *E.g.*, *Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, ... F. 2d ....., 17 FEP Cases 1175 (3d Cir. 1978); *Gabriele* v. *Chrysler* Corp., 573 F. 2d 949 (6th Cir. 1978). However, the attempts of these courts to distinguish Section 14(b) from Section 706(c) are completely unconvincing.*

In *Gabriele*, the Sixth Circuit Court of Appeals attempted to distinguish Section 14(b) from Section 706(c) by pointing to

* The Secretary of Labor filed an amicus brief in the court below supporting respondent's petition for rehearing. The Secretary's views, setting forth the arguments accepted in *Gabriele* and *Holliday*, are by no means controlling particularly since the Department of Labor is not authorized under the ADEA to issue interpretive regulations or guidelines. *See General Electric Co.* v. *Gilbert*, 429 U. S. 125, 141-146 (1976).

Section 14(a) of the ADEA which states that once action is commenced in federal court under the ADEA, all state proceedings are superseded. The *Gabriele* court noted that there is no counterpart to Section 14(a) in Title VII and concluded that Congress would not have imposed a mandatory prerequisite to the filing of a civil suit which could be cut off after only sixty days had passed by the commencement of a federal action. The court also noted that Section 706(c) prevented *all* federal action for a period of sixty days while the state agency has exclusive jurisdiction over the claim. The ADEA contemplates the possibility of concurrent administrative action on the federal level by the United States Department of Labor since an aggrieved individual can file a notice of intent to sue with that agency at the same time state proceedings are initiated.*

These distinctions led the Sixth Circuit to conclude that Congress intended the ADEA to give "*lesser* deference" to state enforcement mechanisms than is the case under Title VII. 573 F. 2d at 954 (emphasis added). However, interpreting Section 14(b) to give an individual *the option* of resorting to appropriate state agencies is tantamount to giving the states *no* deference at all. The existence of Section 14(a) and the absence of an exclusive period of state jurisdiction in no way warrants such a revocation of any deference whatsoever to state authorities.

In *Holliday*, the Third Circuit Court of Appeals, in addition to noting the same distinctions between Title VII and the ADEA as were recognized in *Gabriele*, also relied upon *Lorillard* v. *Pons*, 434 U. S. 575 (1978), where this Court held that jury trials were available in ADEA actions. The *Holliday* court interpreted *Pons* to indicate (17 FEP Cases at 1178):

* The 1978 ADEA Amendments alter the requirement of Section 7(d) that an aggrieved individual must file a notice of intent to sue with the Department of Labor. Instead, a complainant must file a charge of age discrimination with that agency according to the same time limits as were already in effect with respect to the filing of a notice of intent to sue. The Amendments are not applicable to this case.

> that "but for" specific exceptions contained in the ADEA, Congress "intended to incorporate fully [into the ADEA] the remedies and procedures of the [Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq.]." 46 LW at 4151.

The Third Circuit held that because the ADEA incorporates many of the enforcement mechanisms of the FLSA, as opposed to Title VII, Section 14(b) need not be interpreted in the same manner as Section 706(c).

However, in *Pons* this Court specifically recognized that the ADEA, as it was passed in 1967, "is something of a hybrid". 434 U. S. at 578. Indeed, by stating that the ADEA incorporates the FLSA enforcement mechanisms *"but for"* certain exceptions, this Court has indicated that there are portions of the ADEA not modelled after the FLSA. 434 U. S. at 582. There is no counterpart to Section 14(b) in the FLSA. There is therefore no basis to presume that the question of the relationship of the ADEA to state enforcement mechanisms was patterned after the FLSA. Instead, the identity of language between Section 706(c) and Section 14(b) leads to the inescapable conclusion that this particular provision of this "hybrid" Act was derived from Title VII and should be interpreted in the same fashion.*

Pons makes clear that Title VII and the ADEA do share the same general purposes. The Court stated (434 U. S. at 584):

> There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the work place—and in their substantive provisions.

This similarity in purpose, along with the identity of language between Title VII, which was passed in 1964, and the ADEA, which was passed in 1967, makes the doctrine of *in pari materia*

* It was for precisely this reason that the court in the recent decision of *Hadfield* v. *Mitre Corp.*, Civil Action No. 74-2946-S, 47 U. S. L. W. 2338 (D. Mass. 1978), explicitly rejected *Holliday* and the court below and held that Section 14(b) was modelled after Section 706(c) and should therefore be interpreted as a jurisdictional prerequisite.

applicable. Under this settled rule of statutory construction, where there is some uncertainty as to the proper interpretation of a later statutory provision, and both statutes share similar purposes and language, the later statutory provision is interpreted in the same manner as the former. *See Northcross* v. *Board of Education of the Memphis City Schools*, 412 U. S. 427, 428 (1973); *Sands on Statutory Construction* § 51.02 (4th ed. 1973). Applying that principle here, Section 14(b) should be interpreted in the same manner as Section 706(b).

C. The Language of Section 7(d) of the ADEA Supports the Position That the Requirements of Section 14(b) Are Mandatory.

Another important factor establishing the mandatory nature of Section 14(b) is its similarity to Section 7(d) of the ADEA, 29 U. S. C. § 626(d), which provides that *"[n]o civil action may be commenced* . . . until" an aggrieved individual has satisfied certain prerequisites with respect to filing with the Department of Labor. This language of Section 7(d) has repeatedly been construed to set forth a mandatory prerequisite to a civil suit under ADEA. *See, e.g., Hiscott* v. *General Electric Co.*, 521 F. 2d 632 (6th Cir. 1975); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485 (5th Cir. 1974). There is no reason to interpret the similar language of Section 14(b) any differently.

Section 7(d) also provides that in states having laws prohibiting age discrimination and establishing authorities to enforce these laws, an aggrieved individual must file with the Department of Labor within 300 days of the alleged unlawful practice instead of within 180 days as is normally the case. The purpose of the extended filing period is to allow an individual additional time to pursue his state remedy fully and still be able to file in a timely fashion with the federal authorities. *See, e.g., Berry* v. *Crocker National Bank*, 13 FEP Cases 673, 681 (N. D. Cal. 1976); *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619, 626 (E. D. Mich. 1976).

The policy of extending the filing period in states having authorities enforcing laws against age discrimination is patterned after identical provisions in Title VII. *See Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (8th Cir. 1975). This is, of course, another indication that the ADEA's provisions concerning the relationship between state and federal remedies were modelled after Title VII.

In *Gabriele*, the Sixth Circuit recognized that the terms of the ADEA extended filing period are not limited to individuals who file charges with state authorities, thus leading to the possibility of giving the extra 120 days to individuals who do not even file with the state. To avoid such an illogical result, the court held that the extended filing period applies only to individuals who actually utilize the state remedy, a judicial gloss appearing nowhere in Section 7(d) and unnecessary if the plain language of Section 14(b) is given proper effect. If Section 14(b) is properly interpreted as a mandatory requirement, no aggrieved individual will receive the benefit of the extended filing period unless he files in a timely fashion with the state agency since his failure to do so will bar him from maintaining a federal action.

In sum, the plain language of Section 14(b), and its similarity to Section 706(c) of Title VII and Section 7(d) of the ADEA, indicate clearly that filing with a state agency is a mandatory prerequisite to a civil suit. Construing Section 14(b) in any other manner not only ignores the clear meaning of the statute but also violates basic rules of statutory construction.

III. The Legislative History of the ADEA Establishes Filing with an Appropriate State Agency As a Mandatory Prerequisite to Civil Suit.

A. Congress' Desire to Encourage Expeditious Resolution of Age Discrimination Claims Without Formal Proceedings Supports the Construction That Section 14(b) Sets Forth a Mandatory Prerequisite.

The legislative history of the ADEA reveals that Congress desired an age discrimination law utilizing a format which would encourage the settling of age discrimination claims in the most expeditious fashion possible. The main reason for this concern was that the ADEA was designed to protect the rights "of older citizens to whom, by definition, relatively few productive years are left." 113 Cong. Rec. 7076 (1967) (remarks of Senator Javits).

The method chosen to accomplish this goal was primary reliance on informal persuasion and conciliation with litigation used only as a last resort. Thus, the 1967 House Report to the ADEA states:

> [Enforcement should] be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense.

House Rep. No. 805, 90th Cong., 1st Sess., 2 U. S. Code Cong. & Admin. News 2213, 2218 (1967). Similarly, Senator Yarborough, the principal sponsor of the ADEA, stated during Congressional debate (113 Cong. Rec. 31253 (1967)):

> While the bill includes enforcement procedures which are adopted from the Fair Labor Standards Act, it is the hope of the sponsors of this legislation that such procedures will not be needed very often.

See also 113 Cong. Rec. 7076 (1967) (Remarks of Senator Javits) (ADEA lawsuits "may only be commenced after informal methods of conciliation have been exhausted.").

The federal courts have recognized that interpreting Section 14(b) to set forth a mandatory prerequisite to a civil suit under

the ADEA furthers this intent since the state agency will always be given a limited period of at least sixty days in which to resolve claims of age discrimination before an aggrieved individual can institute suit in federal court. As the Second Circuit Court of Appeals held in *Reich* v. *Dow Badische Co.*, 575 F. 2d 363, 369 (2d Cir. 1978):

> Deference to state procedures where they exist is fundamental to the ADEA structure.

The requirement that an individual file with a state agency does not unduly prolong the pendency of age discrimination claims. The aggrieved individual may file with the Department of Labor at the same time he files with the state agency. Under Section 7(d), the individual must wait at least sixty days after filing with the Department of Labor before instituting civil suit. The sixty day waiting period under Section 14(b) may thus run concurrently with the sixty day waiting period of Section 7(d).

In fact, by filing with the federal agency at the same time as the state agency, the possibility of resolving the dispute before the claim ripens into a federal lawsuit is further increased. This is because the Secretary of Labor may also attempt to resolve the claim during the sixty day waiting period. *See Rogers* v. *Exxon Research Engineering Co.*, 550 F. 2d 834, 841 (3d Cir. 1977), *cert. denied*, 434 U. S. 1022 (1978) ("[P]rivate lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor.").

The facts of this case demonstrate that interpreting Section 14(b) as a mandatory prerequisite will not prolong the resolution of an age discrimination claim. Respondent filed this suit on March 7, 1977, almost one year after he filed his notice of intent to sue on March 10, 1976. During this one year period, respondent could have filed with the Iowa Commission, allowed the sixty day waiting period to run, and still have commenced his suit in March 1977. Because he chose to ignore the Iowa Commission, we will never know whether the Commission could

have resolved his claim through the exercise of its conciliatory and adjudicatory powers, thus avoiding the necessity for this suit.

By granting each claimant the option of initiating proceedings with the state agency or proceeding directly in federal courts, Congress' concern with resolving age discrimination disputes quickly and informally is completely frustrated. Instead of maximizing the possibility of resolving age discrimination claims during the sixty day period after filing with the Secretary of Labor, respondent's construction of Section 14(b) would allow aggrieved individuals to ignore available administrative avenues, remain idle during the sixty day period, and then resort immediately to the federal district courts for what could turn into lengthy litigation.*

B. The Legislative History of Section 14(b) Indicates That It Was Patterned After Section 706(c) of Title VII and Should Be Interpreted Accordingly.

In discussing the legislative history of Section 14(b), it should initially be noted that none of the provisions regarding the requirement of seeking redress from administrative agencies were contained in the original bills. See S. 830, reprinted in *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S. 830 and S. 788*, 90th Cong., 1st Session, at 2-5 (1967); H. R. 4221, reprinted in *Hearings Before the Subcommittee on Labor of the House*

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* In *Gabriele*, the Court of Appeals for the Sixth Circuit noted that the ADEA is remedial legislation and its procedural requirements should therefore be liberally construed, citing the opinion of the Eighth Circuit Court of Appeals in *Moses* v. *Falstaff Brewing Co.*, 525 F. 2d 92 (8th Cir. 1975). *See* 573 F. 2d at 954. *Moses* did not even involve a question of the interpretation or application of Section 14(d). Further, Courts construing Title VII have made the same statement about the Civil Rights Act of 1964, *see, e.g., Sanchez* v. *Standard Brands, Inc.*, 432 F. 2d 455, 460-61 (5th Cir. 1970), but have nevertheless held that noncompliance with the requirements of Section 706(c), which is phrased identically to Section 14(b), bars an individual suit.

Committee on Education and Labor on H. R. 3651, H. R. 3768 and H. R. 4421, 90th Cong., 1st Session, at 1-5 (1967). Instead, these bills contained an enforcement mechanism similar to the procedure followed under the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, including the establishment of a new agency empowered to conduct hearings, make findings, and seek enforcement in the courts of appeals. No individual civil actions were authorized by those bills.

During the hearings on these bills, concern was expressed about the lengthy, indefinite delays attendant to such a procedure. As a result, different procedures were suggested, including a provision governing the relationship between state and federal remedies that would be modelled after Title VII. For example, Andrew Biemiller, the legislative director of the AFL-CIO, commented (*Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 830 and S. 788*, 90th Cong., 1st Sess., at 102 (1967):

> Mr. Biemiller. We are frankly a little disturbed by the section in the bill that is now before you which is designed to negative Federal preemption in this field. I think it could lead to great confusion, because if I read it properly, you are virtually leaving the State laws unhampered in their respective jurisdictions.
>
> It would seem to me it would be a far more practical and preferable solution if you would take the pattern that was developed by Senator Dirksen and Senator Humphrey, working in concert, in connection with title VII of the Civil Rights Act of 1964 creating the Equal Employment Opportunities Commission. There, as I recall, when you have a State law that is substantially in agreement with the Federal law a matter of 60 days is given to the State fair employment agency to try to solve the problem.
>
> At the end of that time, if the matter is not resolved, the case is moved to the Federal agency. I think this would be preferable to trying to say that, where there is a State law, the State agency shall have full and complete jurisdiction.

Similarly, Edward Conway of the New York Commission on Human Rights observed (*Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S. 830 and S. 788*, 90th Cong., 1st Sess., at 228 (1967)):

> It is of particular importance that careful attention be given to the Federal-State relationship which will arise from the enactment of Federal legislation in the field of human rights where existing state legislation has been administered successfuly over a period of years.
>
> This factor was taken into account by the Congress upon its consideration and enactment of the Civil Rights Act of 1964.
>
> The experience under those provisions would appear to confirm the need for avoiding any implications of preemption of the field under the Federal statute.
>
> This requires a clear and specific saving clause which will not only save the jurisdiction of the State agencies, but will avoid to the greatest extent possible the coming into being of unnecessary duplications of effort.

These statements were never disputed or debated. And, shortly thereafter, the bill was amended to include Section 14(b) in its present form which, as noted above, contains language virtually identical to Title VII. Given the comments at the Congressional hearings urging that ADEA state deferral policy follow Title VII and the subsequent similarity in language, the conclusion is inescapable that Congress intended to make state filing a mandatory prerequisite to suit under the ADEA just as it was under Title VII.

This legislative history also demonstrates the insignificance of the fact that Section 14(b) is not included as part of Section 7, which sets forth other prerequisites to ADEA suits, a factor relied upon by some courts in holding that compliance with Section 14(b) is not mandatory. Section 14(b) was proposed as an amendment to the Act after the other provisions, including Section 7, had been drafted and debated. Section 7 and Section 14(b) refer to each other, thus incorporating by reference the mandatory requirements contained therein.

In sum, the legislative history of Section 14(b) establishes that Congress intended to require claimants to comply with the provisions of this section before initiating a federal action.* The history discloses that Section 14(b) was intentionally modelled after Section 706(c), is phrased identically, and should therefore be applied in the same manner.

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* In an effort to support its conclusion that section 14(b) does not set forth a mandatory prerequisite, the Third Circuit Court of Appeals in *Holliday* relied upon congressional remarks made during consideration of the 1978 ADEA Amendments. *See* 17 FEP Cases at 1180-81. Reliance on these remarks as being probative of the legislative intent behind the ADEA is inappropriate. This Court has recently held that statements made by Congress in its consideration of the 1978 amendments are entitled to no weight in interpreting the 1967 Act. In *United Air Lines* v. *McMann,* 434 U. S. 192, 200 n.7 (1978), the Court held:

> Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.

See also Teamsters v. *United States,* 431 U. S. 324, 354 n.39 (1977) ("The views of members of a later Congress, concerning different sections of Title VII, enacted after the litigation was commenced, are entitled to little if any weight.").

The Court's comments in *McMann* pertained to the ADEA's mandatory retirement provisions. This subject was under consideration for amendment in 1977. In this case, the remarks relied upon in *Gabriele* are directed at Section 14(b), for which no amendment was ever proposed. It would thus appear *a fortiori* that these remarks are entitled to no weight in discerning legislation intent behind Section 14(b).

The 1978 Amendments to the ADEA in no way deal with Section 14(b). Under well established principles of law, the conclusion is therefore inescapable that Congress must be presumed to have intended to leave existing precedent intact on the subject of state deferral. At the time Congress passed the 1978 Amendments, the only circuit courts which had issued opinions on this question had held that Section 14(b) sets forth a mandatory prerequisite to civil suit. See *Goger* v. *H. K. Porter Co.,* 492 F. 2d 13 (3d Cir. 1974); *Curry* v. *Continental Airlines,* 513 F. 2d 691 (9th Cir. 1975). Congress' failure to change Section 14(b) thus reflects an intention to leave this precedent intact.

CONCLUSION.

For the foregoing reasons, we respectfully request the Court to reverse the decision of the Eighth Circuit Court of Appeals and remand this case to the district court with directions to dismiss this lawsuit.

Respectfully submitted,

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